CHARLES

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 63.

THOMAS W. WHITE ET AL., FORMER COLLECTORS OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, *Petitioners,*

v.

WINCHESTER COUNTRY CLUB, *Respondent.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the District Court (R. 42) is reported in 30 F. Supp. 142. The opinion of the Circuit Court of Appeals (R. 84) is reported in 117 F. (2d) 146.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 30, 1941 (R. 88). The petition for a writ of certiorari was filed on April 29, 1941, and was granted May 26, 1941 (R. 89). The jurisdiction of this court rests

on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether payments by club members (in addition to their regular annual dues) for certain optional golf privileges and tennis privileges acquired for themselves or members of their families were club dues or membership fees within the meaning of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

Statutes and Regulations Involved.

Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, is set forth in Appendix A, *infra*, p. 17.

The pertinent Regulations are given in Appendix A, *infra*, p. 18.

Statement.

These were actions against two former Collectors of Internal Revenue and a former Acting Collector of Internal Revenue to recover taxes on amounts paid for golf and tennis privileges during the period from November 27, 1931, to January 9, 1935. Claim for refund was filed by the respondent and following its rejection these actions were brought (R. 50-51). Judgments were rendered by the District Court in favor of the respondent for an aggregate amount of $9211.25 and interest (R. 54). These judgments were affirmed by the Circuit Court of Appeals (R. 88). Certiorari was granted, May 26, 1941, by this Court (R. 89).

Under the by-laws of the Club which were in effect during the periods in question, the annual dues of a member

were $50, payment of which entitled him to all the privileges of the Club, except golf (R. 47). The taxes upon such dues were paid and there is no controversy with respect thereto. A member who wished to avail himself of the privilege of playing golf could do so by purchasing a full privilege (entitling him to play at all times during the year) at $50 for the year, or a limited one (certain specified days being excepted) at $35 (R. 47), or he could pay a greens fee (R. 64). In addition, a member could purchase for his immediate family (defined R. 48) tennis privileges, limited privileges, or full privileges for sons between 21 and 25 years of age.[1]

Whether or not the member would engage any privilege at all was entirely optional with the individual member. No member was required to engage any privileges because he was a member (R. 63, 66, 74). In fact, during each of the years in question, a substantial number of members did not hold any of the privileges in question.[2]

The case was tried below on an agreed statement of facts and upon evidence adduced at the trial. The practical interpretation and operation of the by-laws were the subject of testimony and the District Court made the following findings (R. 49):

> "Members were permitted to engage privileges for either themselves or their families quite informally. The practice was merely to let the officers know in some way either in writing or orally what privileges were

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[1] Further, a lady not eligible to family privileges (*i.e.*, one who had no male member of her immediate family who could become a member) might become a special member of the Club with limited privileges upon election by the Board of Directors, her annual dues being $50 (R. 48). The tax on payments by these ladies has been paid. No question as to them is involved in this action.

[2] The testimony of Harold V. Hovey, Assistant Treasurer of the Club, showed that there were 43 in 1931, 60 in 1932, 60 in 1933, and 70 in 1934 who did not have golf privileges (R. 75).

wanted. . . . Privileges were dropped in the same informal manner; and if privileges were taken or dropped in the middle of the year, suitable adjustments were made. . . . If no word had been received from a member as to the privileges desired, the same privileges as he had previously held were included on his bill, but he was quite at liberty to strike off such privileges as he did not want,[3] and no attempt was made to collect for privileges thus dropped. On the other hand, by Article X of the by-laws, 'A member not resigning before the beginning of the Club year shall be liable for the dues of that year. The Club year began January first.' . . .

"Upon the agreed facts and all the other evidence, I find that the plaintiff had but one class of membership with the exception of a small class of special members, that neither possessers of golf privileges nor the holders of tennis privileges constituted a separate class of membership, that golf privileges and tennis privileges were optional with members and under the by-laws and the Club practice or policy could be acquired informally at any time, that once acquired there was no recurring obligation to take or pay for them in a succeeding year, that no formal action was required for surrendering such privileges during the year and that the fees therefor were not fixed or definite charges of any particular class of membership."

The findings of the District Court were upheld by the Circuit Court of Appeals (R. 87, 88).

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[3] Attention of the court is called to a statement in the brief for petitioner, p. 16, footnote 14, that "The abatement of payments due was simply a matter of accommodation to the club's members and not an absolute right." This is entirely at variance with the fact as found by the court.

Summary of Argument.

"Dues or membership fees," as used in the statute, include only those payments which are requisite to membership in the Club. The payments by appellee's members for golf privileges and tennis privileges were not required because of membership. On the contrary, these privileges were acquired by members entirely at their option. They could be informally obtained and surrendered at will without affecting one's status as a member. In no way were they fixed and definite charges applicable to all members of a particular class of membership, nor did they represent a recurring obligation extending over an indefinite period of time. Accordingly, the payments were not subject to tax as "dues or membership fees" within the meaning of Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928.

Argument.

Section 501 of the Revenue Act of 1926, as amended by Section 413 of the Revenue Act of 1928, reads in part as follows:

> "(a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—
>
> (1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or . . .
>
> "(d) As used in this section, the term 'dues' includes any assessment, irrespective of the purpose for which made; . . ."

Obviously, not every payment made to such a club by a member is taxable, but only payments made as "dues or membership fees" fall within the scope of the statute.

It is submitted that "dues or membership fees," as used in the statute, are synonymous. We are aware of no instance in which the Government has ever claimed otherwise. In the case of *Foran* v. *McLaughlin*, 59 F. (2d) 158, 160, the court stated:

> "Counsel agree that the terms 'dues and membership fees' as used in the statute are 'synonymous' and 'convertible'."

In *Old Colony Railroad Company* v. *Commissioner*, 284 U.S. 552, 560, this court, in considering the rule to be applied in statutory interpretation, said:

> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' Levy v. M'Cartee, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' Maillard v. Lawrence, 16 How. 251, 261. And see United States v. Buffalo Natural Gas Fuel Co. 172 U.S. 339, 341; United States v. First Nat. Bank, 234 U.S. 245, 258; Caminetti v. United States, 242 U.S. 470, 485. As was said in Lynch v. Alworth-Stephens Co. 267 U.S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts; DeGanay v. Lederer, 250 U.S. 376, 381."

The plain and ordinary meaning of "dues or membership fees" is the amount which a person is required to pay because of membership. A member may have the right to obtain and enjoy additional services and facilities not covered by his membership upon the payment of certain stated sums, but so long as these payments are not required as an incident of membership and are, in fact as well as in name, solely at the option of the individual member, they are not regarded in common parlance, and should not be considered for the purpose of this case, as "dues or membership fees." The test should be whether the payment is required because of membership. Such a construction is reasonable and clear, and can be readily understood and applied.

As contrasted with this interpretation, the rule contended for by petitioner (Br. 14, 15) is that "any payment made by a Club member for the right to the repeated and general use over a period of time of a common facility of the Club should be considered to be an amount paid as 'dues or membership fees' if the amount of payment is not fixed by each occasion of actual use but represents an apportionment of the cost of maintaining and operating that common facility." This rule, we submit, is contrary to the common understanding of the terms "dues or membership fees," and is illogical, indefinite and confusing in application. For example, the rule advocated by the Government would require the application of several tests to each case in order to determine the question of taxability of a particular payment. One of the tests required would be whether the right or privilege acquired to use a common facility of the club extended "over a period of time." Petitioner does not attempt to say what period of time. It will hardly be claimed that payment of a daily greens fee is subject to tax. There appears to be no reason or logic in saying that, if a payment of a fee for one day is not subject to tax, the payment of a similar fee for two days, or

one week, or several weeks or months, would be taxable. The essential character of the payment has not changed. It is common knowledge that the privilege of playing golf for a day, or for a week, or for a month, may be acquired at many golf clubs upon the payment of stated fees by persons who are not members of the club. These privileges are no different in character from corresponding golf privileges acquired by a person who happens to be also a member of the particular club. Neither can properly be considered as "dues or membership fees."

Furthermore, the rule advocated by petitioner, which would require an additional test in each case of whether the amount of the payment in question was fixed by each occasion of actual use or represented an apportionment of the cost of maintaining and operating the common facility involved, would lead to many unsound and incongruous results. Clubs, in general, have many common facilities, other than golf, of which members may avail themselves, such as bedrooms, locker rooms, dining rooms, card rooms, skating, garage facilities, etc., the amount charged for which is not fixed by each occasion of actual use, but represents an apportionment of the estimated cost of maintaining and operating that common facility. Presumably, petitioner would admit, by analogy to the daily greens fee, that a member who engaged a room for a single night, or a locker for a single day, would not be subject to tax on the amount he paid, but (depending upon the period of time to be selected as the criterion and which petitioner has not attempted to fix) if he engaged a room or a locker by the week, month, or longer period, the taxability of the payments made therefor would depend upon the manner in which the charge had been computed, *i.e.*, whether it had been fixed by "each occasion of actual use," or whether it represented "an apportionment of the cost of maintaining and operating" the portions of the clubhouse devoted to

that purpose. It is submitted that the results which would be obtained by such a rule as advocated by petitioner sufficiently demonstrate its unsoundness.

The interpretation of the statute here involved has been the subject of consideration by several courts. The first case was *Weld* v. *Nichols*, 9 F. (2d) 977 (decided in 1925), in which it was held that the words in question include only "definite obligations incidental to membership in the club," covering "only fixed and definite charges applicable to all members of each particular class of membership," and it was accordingly held in that case that payments (in addition to the regular annual dues) paid for golf privileges were not subject to tax. This expression was adopted and the doctrine of the *Weld* case impliedly recognized by the court in *Foran* v. *McLaughlin*, 59 F. (2d) 158 (certiorari denied, 287 U.S. 637). In that case the court held the payments there in question to be taxable, upon the ground that the membership itself—

> "entailed upon their holders a fixed contractual liability to pay monthly green fees, regardless of their desire to continue to use the greens . . . [representing] a recurring contractual obligation, extending over an indefinite period of time, and, in the language of the Weld case, supra, 'incidental' to a 'particular class of membership.'"

The doctrine of the *Weld* case was followed in *Baltimore Country Club* v. *United States*, 7 F. Supp. 607, in which case the court held that payments for annual golf privileges exacted only from those members of the club who desired the privilege of playing golf were not taxable as "club dues or membership fees," the court saying:

> ". . . I am forced to the conclusion that the present fees are not taxable, because they are not based upon

membership. They are not assessed upon any group or class of members because of membership. They are not required of any member unless he desires to play golf. . . . they are not charges, . . . which are actually assessable against all members of any class."

In *Williamson* v. *United States*, 12 F. Supp 26, which involved a similar question, it was found that—

"A member might pay for and obtain any or all of these privileges for the period January 1st to July 1st, or from July 1st to January 1st, for both periods, or for neither, in any year. The fact that a member paid for any or all of said privileges for one or a number of periods did not, and does not, in any way obligate him to continue such payment or payments, nor did it, nor does it, change his position in the event that at a subsequent period such member should desire to continue to pay for and enjoy the same and or additional privileges."

The court, in holding that the amounts paid for golf privileges were not subject to tax, said in part as follows:

"It will be noted that the golf fees paid by the plaintiff and other members of the club are not 'dues' or 'assessments,' but are paid only as a charge for the privilege of using the golf course, and at the option of the member. It is not necessary for him to play golf in order to be a member of the Charlotte Country Club, but, after he has become a member of the country club by paying his initiation fee and annual dues, then he has the privilege of renting the golf course by the day or by the six months or by the year, and whether he pays anything for the use of the golf course depends upon his own volition, and what he does pay as a rental

> or fee for playing golf cannot, in my opinion, be regarded as 'an assessment' or 'dues'. What the member actually does is to pay greens fees, and he can pay these fees and play golf either six months of the year or twelve months of the year, or not play at all."

In *Hardt* v. *McLaughlin*, 25 F. Supp. 684, the question was whether or not charges for golf at the Merion Cricket Club were subject to tax. The court found that when the member had assumed "a binding obligation to pay a fixed definite charge, which obligation extends over a considerable period of time and will be automatically renewed until he withdraws from his preferred position as a user of the privileges in question (a 'recurring contractual obligation'), he really has become one of a particular class of Club members." The court expressly approved the rule laid down in the *Weld* case that "dues or membership fees" included only "fixed and definite charges applicable to all members of each particular class of membership," but held, upon the particular facts there before the court, that the payments in question were taxable.

Philadelphia Cricket Club v. *United States*, 30 F. Supp. 141, was a suit to recover taxes assessed on the plaintiff's members as golf fees. It appeared that any member of the plaintiff club might pay the annual golf fees and have the full use of the golf courses for the current year. The obligation was binding for six months. "That is," as stated by the court, "if assumed for a year, it could be reduced to six months upon notice. It was not recurring. After the expiration of a year the member, even though he had given no notice to the club, was not considered to have assumed an obligation to renew his golf privileges, unless he actually played golf without paying the daily green fee." The court, in holding that the golf fees were not subject to tax,

said that such "charges are what they purport to be, namely, merely a commuted payment for the annual use of certain of the club facilities."

The court distinguished *Hardt* v. *McLaughlin*, *supra*, involving the Merion Cricket Club, primarily upon the ground that at Merion the obligation to pay annual golf charges was binding for the full year; "that it was also recurring, that is unless, before the end of the year, the club was satisfied that the member did not want the privileges for the following year, he would be deemed to have assumed a binding obligation to pay for them." At the Philadelphia Cricket Club, the member was not considered to have assumed an obligation to renew his golf privileges, even without notice to the club, unless he continued to play golf without paying the daily greens fee.

The only other case involving this question is believed to be *Merion Cricket Club* v. *United States*, 119 F. (2d) 578, now pending before this court on certiorari, which involved the same facts as *Hardt* v. *McLaughlin*, *supra*. In view of the fact that that case has been assigned for argument directly following the argument of the instant case, further discussion here of that decision would appear to be unnecessary, except to point out that three separate opinions were written by the Circuit Court of Appeals and that apparently a majority of the court were in agreement with the decision herein appealed from.

A review of the foregoing cases shows a substantial unanimity among the various courts that the words "dues or membership fees" as used in the statute mean "definite obligations incidental to membership" or "fixed and definite charges applicable to all members of each particular class of membership."

In the case at bar, a member did not become liable, because of being a member, for any amount in addition to his annual club dues. No member was required to engage

privileges because he was a member (R. 63, 66, 74) and a substantial number of members did not do so (R. 75). Whether or not he would acquire privileges for himself or members of his family was entirely at his option. As found by the trial court (R. 49), members were permitted to engage privileges either for themselves or their families quite informally and privileges were dropped in the same informal manner; if privileges were taken out or dropped in the middle of the year, suitable adjustments were made, and, if a charge for privileges had been billed to a member, he was quite at liberty to strike off such privileges as he did not want, and no attempt was made to collect for the privileges thus dropped.

In this case the District Court held (R. 54):

> "I find nothing in the foregoing cases or elsewhere indicating that the charges for golf and tennis privileges involved in the cases at bar constituted club 'dues or membership fees'. Where, as heretofore found, the holders of golf and tennis privileges constituted no class of membership, where the golf and tennis privileges involved were optional and could be acquired informally, where having been acquired there was no recurring obligation to take or pay for them in a succeeding year, and where no formal action was required for their surrender during the year, the charges for such privileges cannot be regarded as taxable club 'dues or membership fees.' "

In affirming the decision of the trial court—and we submit correctly—the Circuit Court of Appeals said (R. pp. 87, 88):

> "We find nothing in the instant case or in the decisions above referred to that requires us to disturb the findings of the District Judge that there was but one

class of membership in the plaintiff Club—with the exception of a small special class not involved. The temporary nature of the privileges purchased by members, the fact that such privileges, different in kind, were optional, could be taken and dropped informally at pleasure and involved no recurring obligation to make further payments, are not attributes of a class of membership; but, on the other hand, indicate a limited, temporary use of particular facilities of the club, payment for which cannot be called 'dues or membership fees' in the ordinary acception of those terms."

Reference is made in petitioner's brief (pp. 10, 11) to certain portions of the Treasury Regulations which were in force prior to the decision of *Weld* v. *Nichols*, and which petitioner argues lend support to the rule urged by him. An examination of the history of these Regulations will show that this position is untenable. In 1925, when the *Weld* case was decided, Article 9 of the Treasury Regulations contained the following:

". . . also [subject to tax] are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links.

. . . . . .

"(7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured by the member's family. A payment of this extra $10 is taxable as a membership fee.

. . . . . .

> "(13) A certain golf club, the dues and fees of which are taxable, issues to wives of members cards entitling them to the use of the course for one year, making a charge of $10 therefor. The amounts paid for such cards are taxable."

The *Weld* case was decided December 30, 1925, and the decision was not appealed from by the Government. In May, 1926, within a few months after the decision in the *Weld* case, a new revision of the Treasury Regulations (Treasury Regulations 43) was promulgated, in which the above-quoted paragraphs were deleted. The deleted matter has never appeared in any subsequent edition of the Regulations. It is obvious that the change in the Regulations was made in recognition of the decision in the *Weld* case. In this situation the re-enactment of the law in the Revenue Act of 1926 and in the Revenue Act of 1928 does not support the argument advanced by petitioner, but, quite to the contrary, adds to the conclusiveness of the judicial construction placed upon these words in 1925 by the decision in *Weld* v. *Nichols*, *supra*.

Petitioner in his brief (Br. 17, 18) argues that the "rights acquired" by members having full privileges were identical with the "rights acquired" by Class A members under the old by-laws in effect prior to 1929, and therefore should be taxable.

The "rights acquired" are not the test. "Dues or membership fees" must be only such payments as a person is obligated to make in order to be or remain a member. Here, no payment was required of anyone for the use of the golf course by reason of his membership. If he used the course he paid for what he wanted, for as long as he wanted it, and not because he was a member. He paid for the privilege of using a facility which he could, as of right, at any time drop, without further obligation, without in any way

affecting his standing as a member. That change was wrought by the new by-laws, the only by-laws in effect during any of the periods involved in these cases.

The sound business reasons for making the change in the by-laws were fully set forth in the testimony of John Abbott, president of the Club (R. 57-60), which testimony the District Court adopted as part of its findings and set out *in extenso* in its opinion (R. 45).

The same argument here advanced by petitioner was urged before the Circuit Court of Appeals and was disposed of by that court, as follows (R. 88):

> "In support of their contention the appellants make an argument based upon the fact that the taxpayer, under its original by-laws as they stood before they were changed in 1929, would have been liable for these taxes as dues or membership fees. There is no allegation or evidence here of any improper attempt to avoid taxation. The reasons for the change in by-laws were given fully in the evidence before the District Court. . . ."

Conclusion.

The judgment of the court below should be affirmed.

Respectfully submitted,

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Appendix A.

Revenue Act of 1928, 45 Stat. 791:

SEC. 413. CLUB DUES TAX.

(a) Section 501 of the Revenue Act of 1926 is amended to read as follows:

SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(b) Such taxes shall be paid by the person paying such dues or fees.

"(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or

loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned" (U. S. C., Title 26, Secs. 950, 951, 952).

Treasury Regulations 43 (1928 Rev.) (Part II):[4]

ART. 40. *Dues or membership fees.*—The Revenue Act of 1928 imposes a tax of 10 per cent on any amount paid as dues or membership fees, including all assessments (and also including penalties incurred by failure to pay promptly), to any club which is within the terms of the act: *Provided*, That the dues or fees, including all assessments (but not including penalties incurred by failure to pay promptly), of an "active resident annual member" of such club are in excess of $25 per year. "An active resident annual member" is a member who is neither a life nor a nonresident member, but who, in other respects, enjoys full club privileges, as distinguished from the restricted privileges enjoyed by a person holding an associate or other partial membership.

The term "dues" is defined by the act as including any assessment, irrespective of the purpose for which made. Therefore, assessments for capital expenditures will not be exempt from tax when paid on and after June 29, 1928, provided the sum of the assessments and dues to be paid by active resident annual members exceeds $25 per year.

Thus in the case of a club or organization the regular dues or membership fees of which are less than $25 a year, but which levies an assessment on its active resident annual members, if the regular dues or membership fees, plus the

[4] Article 40 of the 1932 revision of Treasury Regulations 43 is identical with the 1928 revision except that in the first sentence the words "Section 501" are substituted for "The Revenue Act of 1928."

assessment, exceed $25 per year, the tax is applicable. The tax would likewise apply in the case of a club or organization which collects no regular dues or membership fees but meets its expenses by levying assessments on its members as funds are required, provided, of course, the assessments aggregate more than $25 per year for members who enjoy the full privileges of the club or organization.

Where the dues or membership fees, including assessments, determined in the manner herein outlined, of an active resident annual member are in excess of $25 per year, dues or membership fees paid by other classes of members, whether or not they are in excess of $25 per year, are subject to the tax. A fine imposed for the violation of rules promulgated by a club or organization would be neither dues nor membership fees within the meaning of the act, and therefore not taxable.

Examples— . . .

. . . . . .

(5) A certain golf club has two classes of members. Class A members pay $40 per year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to tax.

(6) A certain golf club charges a "green" fee of $1 for each guest that uses the course. Such a fee is not paid "as dues or membership fees," and is, therefore, not taxable as such.

. . . . . .

SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1941.

Thomas W. White, et al., former Collectors of Internal Revenue for the District of Massachusetts, Petitioners,
vs.
Winchester Country Club.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 12, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

We must decide whether members' payments to the Winchester Country Club for certain "privileges" constituted "dues or membership fees" subject to the tax imposed by § 501 of the Revenue Act of 1926, 44 Stat. 9, 92, as amended by § 413 of the Revenue Act of 1928, 45 Stat. 791, 864, on amounts paid "as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year."

Since 1929 and during the period here in question the Club's by-laws provided for "Annual Dues" of $50, which entitled a member to all the privileges of the Club except golf. By paying $35 more, for "Limited Privileges," a member became entitled to play golf during the year, except on specified days; by paying $50, for "Full Privileges," he got the privilege of playing at any time during the year. All but a small portion of the members acquired golf privileges of one sort or the other.

Various forms of "Family Privileges," entitling one or more of a member's family to use the club house and to play tennis and golf, could be had by a member upon payment of specified additional sums, which were less if he had golf privileges than if he did not.

The club year began January first and, according to the by-laws, "dues and fees" were payable on March first. The practice was to bill members during March for "dues" and "privileges" for

the year. Privileges were acquired informally, the practice being to let the Club's officers know either orally or in writing what privileges were desired. A member was billed for the privileges he had previously held if he had not indicated that he no longer desired them, but if he later gave notice that he did not desire a given privilege, no attempt was made to collect the amount billed for it. If a member requested privileges prior to August first, he was billed for the full year; for privileges thereafter requested he was billed for only half a year. Suitable adjustment was also made if privileges were dropped in the middle of the year.

During the period from November 27, 1931, to January 9, 1935, taxes in the amount of $9,211.25 were exacted on account of payments to the Club for the various "privileges" mentioned above. On November 16, 1935, the Club duly filed claims for refund on behalf of its members, and after the Commissioner of Internal Revenue had rejected them, it instituted suits in the United States District Court for the District of Massachusetts against the three Collectors of Internal Revenue to whom the taxes had been paid. The District Court entered judgments for the Club, and the Circuit Court of Appeals for the First Circuit affirmed them upon consolidated appeal. 117 F. 2d 146. Certiorari was granted in this case and in *Merion Cricket Club* v. *United States*, decided by the Court of Appeals for the Third Circuit, 119 F. 2d 578, because of an asserted conflict between the two decisions. 313 U. S. 555; 314 U. S. —.

The generality of "dues or membership fees," the words by which the governing statute designates the payments upon which the tax is laid, necessitates consideration of their legislative background. Earlier Revenue Acts—those of 1917, 1918, 1921, and 1924—had laid a tax in the same terms upon payments to clubs such as the respondent.[1]

The Treasury construed these words on several occasions not long after they were first employed in these Revenue Acts. Treasury Regulations 43 (Part 2), Art. 12, issued under the Revenue Act of 1918, and approved March 28, 1919, gave as examples of their applicability the following: "(5) A certain golf club's dues are $15 per year. Of this amount $10 is expended in the purchase

[1] § 701 of the Revenue Act of 1917, 40 Stat. 300, 319; § 801 of the Revenue Act of 1918, 40 Stat. 1057, 1121; § 801 of the Revenue Act of 1921, 42 Stat. 227, 291; § 501 of the Revenue Act of 1924, 43 Stat. 253, 321.

for the member of a season ticket to a municipal golf course. The whole $15 is, nevertheless, taxable as dues. (6) A certain golf club charges a 'green' fee of $1 for each guest that uses the course. Such a fee is not paid 'as dues or membership fees' and is, therefore, not taxable as such. (7) The members of a certain curling club pay annual dues of $20. By the payment of $10 extra per year the privilege of skating on the club's rink can be secured for the member's family. A payment of this extra $10 is taxable as a membership fee." The same examples are given in this Article as revised on December 3, 1920, with the addition of the following example: "(13) A certain golf club the dues and fees of which are taxable issues to wives of members cards entitling them to the use of the course for one year, making a charge of $10 therefor. The amounts paid for such cards are taxable."

These examples were retained in three subsequent editions of the Regulations, issued under the Revenue Acts of 1921 and 1924, which also added the generalized statements that subject to the tax "are extra charges which are imposed upon members for the privilege of using certain additional facilities for a period of time, as, for example, an additional charge of $60 per annum imposed upon members of a country club for the privilege of using the golf links. A 'greens fee' charged to a guest is not taxable, unless the right or privilege granted in return is for a period of time, such as a season."[2]

Further, albeit slight, evidence of the Treasury's view is found in S. T. 357, Cum. Bul. I-1, p. 434, as follows: "Where a payment for the use of golf links or similar privilege afforded by a club . . . covers a period of time, such as a season, it is subject to the tax on dues . . . . This applies alike to payments made by members and nonmembers."

On December 30, 1925, the United States District Court for the District of Massachusetts held, however, that a charge to a member for the use of a club's golf course for a period of six months was not included within the words "dues or membership fees," on the ground that they "were meant to cover only fixed and definite charges applicable to all members of each particular class of membership." *Weld* v. *Nichols*, 9 F. 2d 977.

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2 Treasury Regulations 43 (Part 2), Art. 9, as issued January 11, 1922 under the Revenue Act of 1921, and as revised April 18, 1922; Treasury Regulations 43 (Part 2), Art. 9, under the Revenue Act of 1924.

No appeal from this decision was perfected, a bill of exceptions being withdrawn by the Government on March 23, 1926. The Revenue Act of 1926 which, like its predecessors, contained the words "dues or membership fees" without any definition thereof, was approved on February 26, 1926. Thereafter, and on May 21, 1926, a revision of the Regulations was promulgated which omitted all the matter quoted above except examples (5) and (6).[3] The Revenue Act of 1928, containing an express definition of "dues and membership fees" in a respect not here material,[4] was enacted while the Regulation was in the same form,[5] and before any court had decided another case like the *Weld* case. Subsequent editions of the Treasury Regulations, issued after the enactment of the Revenue Act of 1928 and before any further statutory treatment of the subject, retained example (6), but substituted for example (5) the following: "A certain golf club has two classes of members. Class A members pay $40 per year dues and are entitled to the full privileges of the club, including the use of the golf course. Class B members pay $25 per year dues and are entitled to the privileges of the clubhouse, but do not enjoy the privilege of the golf course. The total dues of $40 paid by class A members are subject to tax, and, since the dues of such members are in excess of $25 per year, the dues of $25 paid by class B members are also subject to the tax."[6]

During a period after the decision of the *Weld* case the Treasury apparently sought to determine taxability under the doctrine of that case, rather than according to its own prior views. In 1930, and before the beginning of the period involved in this case there issued, however, a General Counsel's Memorandum[7] which, while paying lip service to the doctrine of the *Weld* case, construed and applied it in such manner as to require the imposition of a tax

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[3] Treasury Regulations 43 (Part 2), Art. 9, under the Revenue Act of 1926.

[4] Section 413 of the Revenue Act of 1928, 45 Stat. 791, 864, provided:

"(d) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees', includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned".

[5] Treasury Regulations 43 (Part 2), Art. 9, under the Revenue Act of 1926, as revised May 27, 1927.

[6] Treasury Regulations 43, Art. 40, (1928 and 1932 Rev.); Treasury Regulations 43, § 101.41 (1940 Ed.).

[7] G. C. M. 7505, Cum. Bul. IX-2, p. 414.

on facts apparently substantially similar to those before us here. The Commissioner of Internal Revenue has consistently followed this decision since its promulgation. Efforts were made in cases subsequently litigated in the courts to obtain decisions fixing the meaning of "definite and fixed charge" and "particular class of membership" as used in the statement of the *Weld* doctrine, resulting in holdings of taxability in three instances,[8] and of non-taxability in three besides the present.[9] *Foran* v. *McLaughlin*, 59 F. 2d 158, certiorari denied, 287 U. S. 637, the first court decision rendered after the decision of the *Weld* case itself, held that the payments in question did constitute dues or membership fees. Since the decision of this case, the Commissioner has allowed no claims for refunds on the basis of the *Weld* case, as he had done in some previous instances.

Section 543(b) of the Revenue Act of 1941, Pub. No. 250, 77th Cong., 1st Sess., the first statutory treatment of the subject since the Revenue Act of 1928, explicitly defined "dues", and thereby clearly included the types of payments here in question.[10] The legislative history of this redefinition is inconclusive in respect of the earlier intention of Congress.[11] The action of Congress in thus explicitly defining the existing statutory term is at least as consistent with dissatisfaction on its part with the course of judicial decision as to its meaning as with the existence of an intention to change the law. If any inference is to be drawn from this spelling out of the meaning of "dues," it is one supporting the validity of the construction set forth and adhered to by the Treasury before the *Weld* case, which was substantially adopted by the newly enacted definition. Compare *Mason* v. *Routzahn*, 275 U. S. 175, 178.

Nor do we find the reenactments of the words "fees or membership dues" while the *Weld* case was on the books to be controlling.

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[8] Foran v. McLaughlin, 59 F. 2d 158, certiorari denied, 287 U. S. 637; Merion Cricket Club v. United States, *supra*; Hardt v. McLaughlin, 25 F. Supp. 684.

[9] Baltimore Country Club v. United States, 7 F. Supp. 607; Williamson v. United States, 12 F. Supp. 26; Philadelphia Cricket Club v. United States, 30 F. Supp. 141.

[10] "The term 'dues' includes any assessment, irrespective of the purpose for which made, and any charges for social privileges or facilities, or for golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities, for any perior of more than six days . . . ."

[11] See Sen. Rept. 673, 77th Cong., 1st Sess., p. 48; H. R. Rept. 1040, 77th Cong., 1st Sess., pp. 31-32, 54; Statement by the Chairman of the House Ways and Means Committee, 87 Cong. Rec. 7614.

or even significant, as expressions of Congressional intent. Passage of the Revenue Act of 1926 so soon after the decision of the *Weld* case, and while the Treasury Regulation dealing in terms with the same problem was still in force on the books, of course avails the respondent nothing.

So far as we have been able to ascertain, the Treasury's revision of the Regulation was made in the belief that it was bound to follow the *Weld* case; we cannot assume that the Treasury did more than bow to the District Court. The revision of the Regulation is of ambiguous import, but in any event it signifies no voluntary change in the opinion of the Treasury as to the meaning of the statute. Even if we could assume that the Treasury made a complete and voluntary about face after the decision of the *Weld* case and before the enactment of the 1928 Act, and that the new doctrine came within the scope of the cases applying the "reenactment rule,"[12] this would be bootless to the petitioner, whose claim covers a period commencing after the 1930 decision of the General Counsel of the Bureau of Internal Revenue, *supra*, which favors the imposition of the tax here. If this decision marked a departure from doctrine espoused by the Treasury after the *Weld* case, it was a departure which was within the power of the Treasury to make for the period in question.[13]

Nor was the *Weld* case itself in any sense adopted by the enactment of the 1928 Act. It stood alone when that Act was passed, and "one decision construing an act does not approach the dignity of a well settled interpretation."[14] It was patently incomplete as an exposition of doctrine, and as a District Court decision it had quite restricted direct applicability.

Having tested respondent's proffered constructional crutches and found them unsound, we must decide the meaning of the statute without their aid. We reject the doctrine of the *Weld* case as being intrinsically unsound, and as having been demonstrated by subsequent cases to be unworkable in practice. We also reject as an aid to decision the inquiry made in several cases as to whether the payment in question was in consequence of a "recurring contractual

[12] But compare United States *v.* Mo. Pac. R. Co., 278 U. S. 269, 280; Burnet *v.* Chicago Portrait Co., 285 U. S. 1, 16.

[13] Morrissey *v.* Commissioner, 296 U. S. 344; Helvering *v.* Wilshire Oil Co., 308 U. S. 90; Helvering *v.* Reynolds, 313 U. S. 428.

[14] United States *v.* Raynor, 302 U. S. 540, 552; *cf.* Federal Communications Commission *v.* Broadcasting System, 311 U. S. 132; Helvering *v.* Reynolds, *supra*.

obligation,"[15] since whether such is the case depends merely upon the mechanics of the particular club's finances—a properly immaterial factor.

Consideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a "due or membership fee." So far as finances go, the fundamental notion of club activity is that operating expenses are shared without insistence upon equivalence between the proportion of an individual's contributions and the proportion of the benefits he receives.[16] Thus, on the one hand, payment of the price of an individual dinner at the club dining room or of a single round of golf lacks the element of making common cause inherent in the idea of club activity. But, on the other hand, payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a "due or membership fee" if the payment is not fixed by each occasion of actual use. Such was the case here, and we therefore hold that the payments in question were subject to the tax.

These are in substance the views expressed by the Treasury shortly after "dues or membership fees" was first employed in the Revenue Acts, and consistently pressed by the Treasury, except as it thought judicial authority dictated otherwise. Its substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute. As such they are entitled to serious consideration, independently alike of reenactments of the statute while it was in force on the books and of any temporary abandonment in consequence of disregard by judicial decision.[17]

Reversed.

Mr. Justice ROBERTS took no part in the decision of this case.

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[15] Foran v. McLaughlin, *supra*; Hardt v. McLaughlin, *supra*; Philadelphia Cricket Club v. United States, *supra*.

[16] See Merion Cricket Club v. United States, 119 F. 2d 578, 580.

[17] Compare Griswold, A Summary of the Regulations Problem, 54 Harvard Law Review 398.